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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SCOTT ANTHONY ROBINSON et al., Defendants and Appellants.	2d Crim. No. B200998 (Super. Ct. No. VA092676) (Los Angeles County)

Gregory Stephen Knapp and Scott Anthony Robinson appeal the judgments following their conviction for attempted murder (Pen. Code, §§ 187/664),[1] and first degree robbery in concert (§§ 211/213). The jury found true allegations that Knapp and Robinson personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that Robinson personally used a deadly weapon (§ 12022, subd. (b)(1)). Knapp claims the trial court erroneously excluded evidence of an out-of-court statement he made and presented the case to the jury on an incorrect theory concerning infliction of great bodily injury. He also claims insufficient evidence that he personally inflicted great bodily injury or had suffered a prior strike conviction, and abuse of discretion in denial of his *Romero* motion to strike a prior serious felony conviction.[2] Robinson claims the trial court erred in failing to instruct the jury on the lesser included offense of attempted

[1] All statutory references are to the Penal Code unless otherwise stated.
[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

robbery, and committed error under section 654 in imposing sentences and great bodily injury enhancements for both robbery and attempted murder, and in imposing an incorrect sentence on the enhancement for the robbery. We will correct a sentencing error concerning the section 12022.7 enhancement to the robbery. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

Ernie Fogg and codefendant Shell Walker, a prostitute, arranged to meet at a motel for the purpose of having sex and consuming methamphetamine which Fogg agreed to provide. When Fogg arrived at the motel room, Walker greeted him. Knapp and Robinson, who had been hiding in the bathroom, attacked Fogg and threw him down on the bed. Robinson, a friend of Walker, was armed with a knife.

Fogg felt a knee in his back and a knife at his throat. Robinson demanded Fogg's drugs and money, while Knapp punched and kicked Fogg in the face and head. Knapp and Robinson took $70, a cell phone, and car keys from Fogg's pocket. When asked, Fogg stated that the drugs and more cash were in his car. Fogg was bound and Robinson threatened to sodomize him.

Fogg freed his hands and unsuccessfully attempted to escape by diving out of a window. Knapp and Robinson renewed their physical assault by punching and stabbing Fogg in the face, neck, and chest. Fogg managed to crawl to the door, and get out of the motel room. Knapp and Robinson ran to their car and drove off.

When police arrived, Fogg was bleeding and was having difficulty breathing. He was taken to the hospital. His injuries included "holes" near his hairline, a "slice" at the base of his skull, and additional stab wounds to the face, all of which wounds required stitches or staples. He also had other stab wounds, a punctured lung, bruises on his face and eye area, and swelling of the head. Fogg remained in the hospital for several days.

Police officers found Fogg's car keys in the motel room, but not the cell phone or $70 removed from Fogg's pocket. In a search of Fogg's car, police found $1,500 in cash, 12 grams of methamphetamine, and other drugs.

Knapp, Robinson, and Shell Walker were charged with attempted murder, first degree robbery in concert, and attempted sodomy in concert.[3] It was alleged as to all counts that Knapp and Robinson personally inflicted great bodily injury and personally used a deadly weapon. It was also alleged that both Knapp and Robinson had each suffered a prior serious or violent felony conviction within the meaning of the Three Strikes law, each had serious felony convictions within the meaning of section 667, subdivision (a)(1), and each had served prior prison terms (§§ 667, subds. (a)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b)).

Knapp and Robinson were convicted by jury of attempted murder and robbery. The jury also found true allegations that Knapp and Robinson inflicted great bodily injury in the commission of the robbery, and in the commission of the attempted murder. The jury found a true allegation that Robinson personally used a deadly weapon but found a similar allegation against Knapp not true. The jury also found not true an allegation that the attempted murder was willful, deliberate and premeditated. The jury was unable to reach a verdict on the attempted sodomy and that count was dismissed. In a bifurcated trial, the trial court found the prior conviction and prison term allegations true as to both Knapp and Robinson.

The court sentenced Knapp to a prison term of 22 years. The sentence for attempted murder consisted of the middle term of seven years, doubled for the prior strike, plus three years for the great bodily injury enhancement, and five years for the prior serious felony enhancement. (§ 667, subd. (a)(1).) The court imposed a concurrent term of seven years for the robbery, consisting of the four-year middle term, plus three years for the great bodily injury enhancement. The prior prison term allegations were stricken.

The court sentenced Robinson to a prison term of 31 years. The sentence for the attempted murder consisted of seven years doubled for the prior strike, plus three years for the great bodily injury enhancement, five years for the prior serious felony

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[3] Walker entered into a plea agreement before jury deliberations.

enhancement (§ 667, subd. (a)(1)), and one year for a prior prison term (§ 667.5, subd. (b)). The sentence for the robbery, imposed to run consecutively, consisted of four years for the robbery (one-third of the midterm doubled for the prior strike), plus three years for the great bodily injury enhancement, and one year for a prior prison term. (§ 667.5, subd. (b).) The personal use of a deadly weapon enhancement was stricken. (§ 12022, subd. (b)(1).)

DISCUSSION

KNAPP'S APPEAL

No Error in Exclusion of Hearsay Statement

Knapp offered an out-of-court statement he made to Walker a few hours after the attack that Robinson had gone crazy and stabbed Fogg, and that Knapp also had been stabbed. The court excluded the entire statement under the *Aranda/Bruton* rule as incriminating Robinson. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.) Knapp does not challenge exclusion of the statement that Robinson went crazy and stabbed Fogg, but contends the trial court erred in excluding the statement that he himself had been stabbed. He argues the statement was admissible to prove a physical sensation (Evid. Code, § 1250, subd. (a)), and the *Aranda/Bruton* rule did not require its exclusion. We review the admission of evidence for abuse of discretion, and conclude that there was no abuse of discretion in this case. (*People v. Brown* (2003) 31 Cal.4th 518, 547 [standard of review].)

As an exception to the hearsay rule, an out-of-court statement of a declarant's "then existing state of mind, emotion, or physical sensation" is admissible if that state of mind, emotion, or physical sensation is "itself an issue in the action," or the "evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).)[4] Knapp's statement that he had been stabbed does not qualify for

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[4] Evidence Code section 1250 provides in its entirety: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation

admission under that statute.[5]

Knapp's statement related to his physical condition of having a knife wound, but it was not offered to prove that physical condition as "an issue in the action," or "to prove or explain acts or conduct of" Knapp. The statement was offered to prove that Robinson stabbed Knapp and, by inference, that Robinson did all of the stabbing during the attack making Knapp a victim rather than the perpetrator.

A statement concerning the cause of a physical sensation relates to the declarant's memory of an event, not the physical sensation itself. As such, it is inadmissible under Evidence Code section 1250, subdivision (b) as a "statement of memory or belief to prove the fact remembered or believed." (See *People v. Rincon* (2005) 129 Cal.App.4th 738, 751; *People v. Deeney* (1983) 145 Cal.App.3d 647, 652.) Evidence of a declarant's mental or physical condition is admissible only if it does not include "a description of the past conduct of a third person that may have caused that mental condition . . . ." (*People v. Hamilton* (1961) 55 Cal.2d 881, 895, reversed on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 442.)

In addition, the evidence would have been cumulative. Other undisputed evidence shows that Robinson, not Knapp, had the knife and that Knapp had suffered a knife wound at the hand of Robinson during the attack on Fogg.

We also disagree with Knapp's contention that the statement was admissible under the *Aranda/Bruton* rule. Under that rule, an out-of-court statement by a nontestifying defendant that incriminates a codefendant is inadmissible in a joint trial of the two defendants because admission would violate the codefendant's rights of confrontation and cross-examination. (*People v. Aranda, supra,* 63 Cal.2d at pp. 528-531; *Bruton v. United States, supra,* 391 U.S. at pp. 135-137.) A statement redacted to

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at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

5 Although the trial court did not rely on Evidence Code section 1250 in excluding the statement, we will affirm a ruling that is correct on any theory of applicable law. (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.)

eliminate prejudice to the codefendant is admissible, but otherwise the entire statement must be excluded. (*Ibid.*; see *Richardson v. Marsh* (1987) 481 U.S. 200, 211.)

Knapp does not argue that his statement could have been redacted but, instead, argues that the *Aranda/Bruton* rule is not absolute and that an out-of-court statement by one defendant incriminating a codefendant may be admissible if prejudice to the declarant from exclusion is greater than prejudice to the codefendant from admission. The issue, however, is not whether the trial court could have admitted the statement without abusing its discretion. The question is whether the court abused its discretion by excluding the statement. There is no authority that exclusion of a statement under facts remotely similar to the instant facts constitutes abuse of discretion.

For the same reasons as set forth above, we reject Knapp's claim that the exclusion of the statement violated his constitutional right to present a defense. The constitutional right to present a defense does not encompass the right to present inadmissible evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *People v. Ayala* (2000) 23 Cal.4th 225, 266.)

No Error Regarding Group Beating Theory

1. *Case Presented to Jury on Correct Theory*

Section 12022.7, subdivision (a) applies to persons who *personally* inflict great bodily injury. (*People v. Cole* (1982) 31 Cal.3d 568, 572.) A person who participates in a group beating is deemed to have personally inflicted great bodily injury when it is not possible to determine which assailant inflicted which injuries, and when the defendant's blows alone could have caused great bodily injury or the defendant knew the cumulative effect of the blows from all assailants could have caused great bodily injury. (*People v. Modiri* (2006) 39 Cal.4th 481, 494, 500-501; *People v. Corona* (1989) 213 Cal.App.3d 589, 594.)

Knapp contends that the imposition of a great bodily injury enhancement must be reversed because the prosecutor misstated the "group beating" principle, causing the case to be presented to the jury on an incorrect legal theory. Knapp argues that the

prosecutor told the jury during closing argument that the enhancement could be imposed merely if Knapp knew Robinson was stabbing Fogg. We disagree.

It is established that, when a legally inadequate or incorrect theory of a case is presented to a jury, reversal generally is required unless the record reflects that the jury's finding was not based on the legally invalid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130; *People v. Perez* (2005) 35 Cal.4th 1219, 1233.) But, more than an incorrect argument is required before a case is deemed to have been submitted to the jury on a legally inadequate theory. (*People v. Morales* (2001) 25 Cal.4th 34, 43.) When the court properly instructs the jury, a misstatement of the law by the prosecutor "merely amount[s] to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis." (*Ibid.*)

Here, it is undisputed that the jury was properly instructed on the group beating principle and the prosecution's burden of proving its elements. (CALJIC No. 17.20;**6** see also *People v. Modiri*, *supra*, 39 Cal.4th at pp. 493-494.) Therefore, any improper argument by the prosecutor constituted no more than misconduct. Because Knapp failed to object at trial, he has waived any contention regarding misconduct. (*People v. Morales*, *supra*, 25 Cal.4th at pp. 43-44; see *People v. Hill* (1998) 17 Cal.4th 800, 820.)

In any event, the prosecutor's argument did not materially misstate the law or CALJIC No. 17.20. The prosecutor expressly and correctly advised the jury that the group beating principle applies when the jury cannot "determine who is causing the GBI, but both of them could be causing it together . . . ." The prosecutor also argued that, if

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6 In relevant part, CALJIC No. 17.20 provides: "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim."

Knapp was "doing the kicking and hitting [and] knows that defendant Robinson is stabbing the guy [, he] too, is responsible for the GBI . . . ." Although this latter statement may be imprecise, it is not a misstatement of the law. The prosecutor did not argue that mere knowledge an accomplice is inflicting injury supports the enhancement, but rather that Knapp's direct participation in the beating by inflicting multiple blows on the victim is sufficient to hold Knapp "responsible for the GBI."

2. *Substantial Evidence Supports Imposition of Enhancement*

Knapp also contends that there was no substantial evidence that the physical force applied by Knapp could have caused great bodily injury. He argues that the evidence shows Robinson alone inflicted great bodily injury to Fogg. We disagree.

As stated, the great bodily injury enhancement can be imposed on a person participating in a group beating who applies physical force sufficient to produce great bodily injury by itself, or knows the cumulative effect of the combined force could result in great bodily injury. (*People v. Modiri, supra*, 39 Cal.4th at pp. 494, 500-501.) In both instances, the defendant must apply unlawful physical force contributing to the victim's injuries and not merely assist an accomplice in some other manner. (*Id.*, at pp. 494-495.) The "defendant's role in both the physical attack and the infliction of great bodily injury cannot be minor, trivial, or insubstantial." (*Id.*, at p. 494.)

Here, the evidence shows that Robinson inflicted the stab wounds, but that it was impossible to determine whether blows by Knapp or Robinson inflicted certain of Fogg's serious injuries. Also, the evidence reasonably permitted the jury to conclude that Knapp knew that the cumulative effect of the force applied by Robinson and himself was sufficient to result in great bodily injury.

Moreover, there was substantial evidence to support a finding that the physical force applied by Knapp, standing alone, was sufficient to cause great bodily injury to Fogg. Evidence shows that serious injuries resulted from stab wounds, but also that other blows caused the swelling of Fogg's entire face and head and considerable bruising in the eye area. Great bodily injury means "a significant or substantial physical injury." (§ 12022.7, subd. (f).) The victim does not have to suffer permanent or

protracted "disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "Abrasions, lacerations, and bruising can constitute great bodily injury." (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 732-733.)

Bank Robbery Conviction Qualifies as a Strike

Knapp contends that there was insufficient evidence that his 1992 federal conviction for bank robbery, a violation of 18 United States Code section 2113(a) (section 2113(a)), qualifies as a strike under the Three Strikes law. We disagree.

Section 2113(a) covers two distinct offenses in separate paragraphs. The first offense covers the taking of money or other property from a bank "by force and violence, or by intimidation," and the second offense covers entry into a bank with the intent to commit "any felony affecting such bank."[7] The first offense, but not the second, constitutes a serious felony under the Three Strikes law. (*People v. Miles* (2008) 43 Cal.4th 1074, 1081-1082.)

When a prior conviction is for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. (*People v. Miles, supra*, 43 Cal.4th at p. 1083; see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Accordingly, the mere fact that Knapp was convicted for a violation of section 2113(a) would not establish whether his offense was a violation of the first or the second paragraph of section 2113(a). Admissible evidence that describes the nature and circumstances of the conviction, however, can establish whether a conviction falls

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[7] Section 2113(a) provides in its entirety: "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined under this title or imprisoned not more than twenty years, or both."

under the first paragraph of section 2113(a) and qualifies as a strike. (*Miles, supra*, at p. 1082; *People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) "Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record, and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction." (*Miles*, at p. 1083.)

Here, there is substantial and unrebutted evidence in the form of the indictment and Knapp's plea agreement that the section 2113(a) conviction was for violation of the first paragraph of the statute and, therefore, a serious felony under California law. The indictment unambiguously alleges that Knapp violated section 2113(a) by taking money from a bank employee "by force, violence and by intimidation." The indictment does not allege the elements of the non-strike offense set forth in the second paragraph of the statute.

Also, in his plea agreement, Knapp pleads guilty to the crime alleged in the indictment. The plea agreement further includes a stipulation for sentencing under the federal sentencing guideline for "robbery." Robbery in both legal and common parlance refers to the taking, or attempted taking, of bank property from the person of another "'by force and violence, or by intimidation.'" (*People v. Miles, supra*, 43 Cal.4th at p. 1085.)

No Abuse of Discretion in Denial of Romero Motion

Knapp contends that the trial court abused its discretion in denying a *Romero* motion to strike his 1992 federal bank robbery conviction for purposes of sentencing under the Three Strikes law. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 530.) We disagree.

A trial court has limited discretion under section 1385 to strike prior convictions in three strikes cases. The court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence

should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the denial of a section 1385 motion under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-374.) There was no abuse of discretion in this case.

As the trial court emphasized, Knapp's current offenses showed extreme violence, and that his prior convictions were numerous including the 1992 bank robbery conviction and a series of convictions between 1998 and 2004, including two burglaries. The court also noted that Knapp had served three prison terms, had no substantial employment, a drug problem, and limited prospects for a crime-free future. These factors are more than sufficient for the court to have concluded that he fell squarely within the spirit and purpose of the Three Strikes law. Knapp's argument that his bank robbery conviction was 15 years old, he accepted a plea bargain to that offense, and his other crimes were nonviolent are minor mitigating factors at most when compared to his long and continuous criminal history and the increasing seriousness of his crimes.

ROBINSON'S APPEAL

No Instructional Error

Robinson contends that the trial court erred in failing to instruct the jury on the lesser included offense of attempted robbery. We disagree.

Robbery is the taking of personal property in the possession of another by means of force or fear. (§ 211.) Attempted robbery is a lesser included offense occurring when the defendant intends to commit robbery and performs a direct but ineffectual act toward its commission. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, superseded on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

A trial court must instruct on lesser included offenses supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) Evidence is substantial enough to require an instruction if a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Breverman*, at p. 162.) We review the record independently

to determine whether an instruction on the lesser offense should have been given. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181.)

Here, an instruction on attempted robbery was not required because there was no substantial evidence that Robinson was guilty only of attempted robbery. Fogg testified that Robinson reached into his pockets and took $70 in cash, his cell phone, and his car keys. This action constituted the commission of a robbery, not a mere attempt. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

Robinson relies on statements Fogg made to the police shortly after the offenses. One officer testified that Fogg stated that he was uncertain anything had been taken from him, and another officer testified that Fogg claimed his cell phone and car keys had been taken but did not mention the cash. There was also evidence that one of Fogg's cell phones and his car keys were recovered by the police at the scene, and that the police also found cash and drugs in Fogg's car.

Evidence that Robinson and Knapp left behind the cell phone and car keys taken from Fogg's pocket, failed to steal the money and drugs in Fogg's car, and escaped with no more that $70 in cash does not support the assertion that the offense was only attempted robbery. The taking element of robbery requires gaining possession of the victim's property and its asportation. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 1165.) The asportation requirement is satisfied by evidence of slight movement, and there is no requirement that the robber escape with manual possession of the loot. (*Ibid.*; *People v. Pham* (1993) 15 Cal.App.4th 61, 65.)

No Section 654 Violation

Robinson contends that his robbery sentence should have been stayed under section 654 because both the attempted murder and robbery were committed as part of an indivisible course of conduct. We disagree.

Section 654 prohibits multiple punishments for a single act, even though the act constitutes more than one crime, if the crimes are part of a single, indivisible transaction. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021.) Whether section 654 bars multiple punishments is a question

of fact for the trial court and we will affirm a trial court finding that is supported by substantial evidence. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

When assaultive conduct consists of the force necessary for the commission of a robbery, separate punishment for both the robbery and the assault is prohibited. (*People v. Logan* (1953) 41 Cal.2d 279, 290.) Conversely, an assault of a robbery victim after completion of the robbery is considered to have been committed pursuant to an independent objective and may be separately punished. (*People v. Coleman* (1989) 48 Cal.3d 112, 162-163; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190, 193.) Here, substantial evidence supports the trial court's implied finding that Robinson and Knapp had different objectives in committing the attempted murder and robbery.

In *People v. Nguyen, supra,* 204 Cal.App.3d 181, the defendant was convicted of robbery and aiding and abetting an attempted murder. After defendant took money from a store cash register, his partner took the clerk to a back room, forced him to lie down, and shot him. The court affirmed separate punishment for the robbery and attempted murder, holding that "a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*Id.*, at p. 193.)

The same principle applies here. The robbery was committed when Fogg was thrown down and restrained. After Robinson and Knapp had taken control of his money, cell phone, keys and watch, Fogg attempted to escape and was beaten and stabbed as he crawled across the floor. Although the robbery and attempted murder were close in time, the criminal objectives were not the same. Their attempt to murder was a separate and independent act that was not necessary to effectuate the robbery.

Section 654 does not apply to "gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense. Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape, evade prosecution, or for no reason at all, may be found by the trier of fact to have been done for an independent reason." (*People v. Nguyen, supra*, 204 Cal.App.3d at p. 191; see also *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.)

Great Bodily Injury Enhancements Properly Imposed for Both Offenses

In a similar argument based on section 654, Robinson contends that the trial court erred by imposing separate section 12022.7 great bodily injury enhancements for the robbery and the attempted murder because the great bodily injury was inflicted on a single victim in a single act. We disagree.

The question of whether section 654 applies to sentence enhancements in general is unsettled. Some Courts of Appeal decisions hold that section 654 is inapplicable because enhancements do not define an offense but relate to the penalty imposed. (See *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1298; *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355.) Other courts have applied section 654 to limit enhancements for a single act committed against a single victim concluding that the statute prohibits multiple punishment for the same act whether it results in a conviction or enhancement. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 55-56; *People v. Arndt* (1999) 76 Cal.App.4th 387, 394-397.) The California Supreme Court has declined to impose a blanket rule regarding the applicability of section 654 to enhancements. (*People v. Palacios* (2007) 41 Cal.4th 720, 728.)

In *People v. Reeves, supra,* 91 Cal.App.4th at page 56, the court concluded that section 654 barred separate section 12022.7 bodily injury enhancements for an assault against a single victim and a burglary arising out of the same incident. The court concluded that multiple sentence enhancements could not be imposed for a single act of inflicting great bodily injury upon one person even though the defendant committed two crimes involving the same victim. (*Id.,* at pp. 56-57.)

Reeves indicated, however, that separate great bodily injury enhancements could be imposed if there is evidence of two separate and divisible assaults. (*People v. Reeves, supra,* 91 Cal.App.4th at pp. 56-57.) Here, there is substantial evidence that Fogg's great bodily injury resulted from two divisible assaults by Robinson and Knapp committed with different criminal purposes. Fogg was initially assaulted when he entered the motel and before he attempted to escape through the window. A second assault occurred as Fogg crawled along the motel room floor in an attempt to escape.

Accordingly, the imposition of two section 12022.7 enhancements was proper whether or not section 654 applies to section 12022.7.

Sentencing Error Regarding Robbery Enhancement

Robinson contends that the trial court erred by imposing a full three-year sentence for both section 12022.7 enhancements. He argues that the court correctly sentenced him to one-third of the midterm for the subordinate robbery count, but failed to make a corresponding reduction in the sentence for the enhancement to that count. Respondent concedes, and we agree. When a person is convicted of multiple felonies and a consecutive term of imprisonment is imposed, the term for the subordinate offenses is one-third of the midterm, "and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (§ 1170.1, subd. (a).) Based on this rule, Robinson's sentence for the great bodily injury enhancement to the robbery should be one year.

DISPOSITION

The trial court is directed to modify the abstract of judgment for Robinson to show a sentence of one year for the section 12022.7 enhancement to the robbery count, and to forward an amended abstract of judgment to the Department of Corrections. In all other respects the judgments for Knapp and Robinson are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Dewey L. Falcone, Judge

Superior Court County of Los Angeles

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